United Nations S/2013/624

Security Council

Distr.: General
22 October 2013

Original: English

Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council

Further to decision No. Ext/Assembly/AU/Dec.1 (Oct.2013) adopted at the Extraordinary Session of the Assembly of the African Union on 12 October 2013 (see annex, enclosure 3), Kenya is under guidance to forward to the United Nations Security Council a request for deferral under Article 16 of the Rome Statute of the International Criminal Court.

Kenya seeks a decision by the United Nations Security Council that no investigations or prosecution shall be commenced or proceeded with in regard to the cases relating to the situation in the Republic of Kenya, namely, ICC-01/09-01/11, with effect from the date of a decision by the Security Council on this request.

This request under Article 16 of the Rome Statute of the International Criminal Court is being made:

1. In view of the threat to the peace, breach of the peace or act of aggression likely to arise in the light of the prevailing and continuing terrorist threat existing in the Horn of Africa and East Africa;

2. In order to prevent an aggravation of the situation with regard to the peace and security of Kenya and its neighbouring countries;

3. In order to provide time during the term of the deferral, for Kenya, in consultation with the Court and Assembly of States Parties to the Rome Statute, to consider how best to respond to the threat to international peace and security in the context of the Kenyan situation.

Kenya therefore seeks action by the Security Council to prevent the aggravation of the threat, breach of the peace or act of aggression that the terrorism menace poses to national, regional, continental and international peace and security.

I would request you to have this letter and its annex issued as a document of the Council, as a matter of urgency.

(*Signed*) Macharia **Kamau**
Ambassador
Permanent Representative

13-52635 (E) 251013

Please recycle

Annex to the identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council

Permanent Observer Mission of the
AFRICAN UNION to the
United Nations

الاتحاد الأفريقي

Mission Permanente d'Observation
de l'UNION AFRICAINE auprès
des Nations Unies

UNIÃO AFRICANA

305 East 47th Street, 6th Floor, New York, NY 10017 Tel. (212) 319 5490 Fax (212) 319 7135/319 5509
Email : aumission_ny@yahoo.com Website : www.aumission-ny.org

NY/AU/POL/14/930/13 October 21, 2013

Excellency,

I have the honor to forward herewith a self-explanatory letter Ref No. BC/U/1814.10.13. dated 16 October, 2013 addressed to you, in your Excellency's capacity as President of the Security Council for the Month of October 2013, by H. E. Dr. Nkosazana Dlamini Zuma, Chairperson of the African Union Commission, under cover of which is transmitted a letter (Ref No. BC/OLC/2013) addressed by AU Member States regarding a request for deferral of the proceedings initiated by the International Criminal Court(ICC) against the President and Deputy President of the Republic of Kenya.

Please accept, Excellency, the assurances of my highest consideration.

Tete Antonio
Ambassador
Permanent Representative

H. E. Mr. Ashin Mehdiyev
Permanent Representative of the Republic of Azerbaijan
to the United Nations
President of the Security Council for the Month of October 2013
New York

Enclosure 1

AFRICAN UNION
الاتحاد الأفريقي

UNION AFRICAINE
UNIÃO AFRICANA

BC/U/1814.10.13

Addis Ababa, 18 October 2013

Mr. President,

I have the honor to refer to the just ended Extraordinary Session of the Assembly of Heads State and Government of the African Union on Africa's Relationship with the International Criminal Court held on 12 October 2013, at the Headquarters of the African Union, in Addis Ababa, Ethiopia.

I would like to forward herewith a self-explanatory letter from AU Member States relating to a request for deferral of the proceedings initiated by the International Criminal Court (ICC) against the President and Deputy President of Kenya.

I am confident that your Institution will extend the necessary cooperation to the African Union, with a view to ensuring that the request by African Leaders is adequately and satisfactorily acted upon.

While renewing the expression of my sincere gratitude, please accept, Mr. President, the assurances of my highest consideration.

Nkosazana Dlamini Zuma (Dr.)

H.E. Mr. Agshin Mehdiyev
Permanent Representative of the Republic of Azerbaijan to the UN
President of the Month of October 2013 of the Security Council of the United Nations
New York, USA

C.C.: H.E. Mr. Ban-Ki Moon, UNSG

Enclosure 2

AFRICAN UNION
الاتحاد الأفريقي

UNION AFRICAINE
UNIÃO AFRICANA

BC/OLC/2013

Addis Ababa, 12 October 2013

Mr. President,

As you are aware, the 21st Ordinary Session of the Assembly of Heads of State and Government of the African Union was held on 26 and 27 May 2013 in Addis Ababa, Ethiopia. At the said session, the Assembly adopted Decision Assembly/AU/Dec.482 (XXI) on International Jurisdiction, Justice and the International Criminal Court (ICC), a copy of which is attached herewith.

Pursuant to the above-mentioned decision, the Assembly expressed, *inter alia*, its concerns over the proceedings initiated by ICC against the President and the Deputy President of the Republic of Kenya, which may pose a threat to the ongoing efforts in the promotion of peace, national healing and reconciliation, as well as the rule of law and stability in Kenya and the Region.

The Assembly also deeply regretted that the requests by Kenya and subsequently the African Union to the United Nations (UN) Security Council to defer the proceedings initiated against the President and Deputy President of the Republic of Kenya, in conformity with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, were not acted upon.

In that regard, we, the Member States of the African Union (AU)hereby solicit the cooperation of the UN Security Council, with a view to finding a sustainable solution to the issue, and in particular, ensuring that the African Union Member States request for a deferral of the ICC investigations and prosecutions in relation to 2007-2008 post-election violence in Kenya is considered positively by the UN Security Council.

H.E. Mr. Agshin Mehdiyev
Permanent Representative of the Republic of Azerbaijan to the UN
President of the Month of October 2013 of the Security Council of the United Nations
New York, USA

The security situation in Kenya is very complex. There are at play important dynamics and tensions of politics, peace, justice, and the rule of law, regional and national insecurity as well as a very acute sense of ethnicity that cannot be wished away or swept under the carpet.

The government of Kenya has undertaken a number of reforms in accordance with the National Accord and Reconciliation Process. The country has adopted a new Constitution that allows greater inclusion in the context of Kenya's diversity. Progress has been made in transforming its police and restoring the independence and credibility of its judiciary. Likewise, Kenya has put in place bold measures aimed at promoting national reconciliation and healing as well as peaceful resolutions of conflicts among local communities.

In this vein, positive measures have been implemented to ensure the return of refugees and the resettlement and compensation of the victims of the tragic events of 2007. In all those initiatives, both President Uhuru Kenyatta and Deputy President William Samoei Ruto, as well as all key stakeholders of the Kenyan society, are taking an active part and leadership role.

As you would observe and as demonstrated by the September 2013 terrorist attacks, Kenya is a frontline state in the fight against terrorism at regional, continental and international levels. In this regard, we wish to stress the threat that this menace poses to the region in particular and the continent in general; the proceedings initiated against the President and the Deputy President of Kenya will distract and prevent them from fulfilling their constitutional responsibilities, including oversight for national and regional security affairs.

In addition, Kenya plays an active and critical role in the stability and fight against terrorism at home and in the region, as demonstrated by the tragic event of the Westgate Shopping Mall in Nairobi in September 2013.

It will be recalled, Mr. President, that the President and Deputy President of Kenya have demonstrated full cooperation in the ICC process. In this regard, we wish to call upon you and the Members of UN Security Council to show the same level of cooperation by deferring the proceedings against the President and Deputy President of Kenya.

The measures put in place towards restoration of peace and national reconciliation have been spearheaded and championed by the President and his Deputy. Kenyans democratically elected their leaders in March 2013, and they expect that their leaders will discharge their constitutional responsibilities as elected

executive leaders of the Republic of Kenya. This, if not considered, will be adversely impacted by the process at The Hague and thus, will undermine progress as well as threaten Kenya's peace and stability.

. The new Constitution of Kenya formed the basis for overall restructuring of the governance structure and the implementation of a wide range of institutions, commissions and legislation reforms that domesticate the constitutional safeguards and human rights in order to strengthen the fight against impunity etc. The country also initiated a Truth, Justice and Reconciliation process, as part of the Accord signed in 2008, to address the cause and effects of historical injustices and gross violations of human rights that will contribute to national healing and reconciliation.

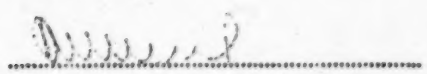
In light of the peace and security situation in Kenya and the Region, the African Union Member States would like to submit a formal request for a deferral of the proceedings initiated by the ICC against the President and Deputy President of the Republic of Kenya in order to provide them with the time required for the enhancement of the effort aimed at combatting terrorism and other forms of insecurity in the country and the region.

We wish to request that this letter be circulated to all members of the UN Security Council, as an official document be placed before the UN Security Council as an official request of the AU Member States to the UN Security Council; and further urge that this request for deferral be considered as a matter of urgency by 10th of November 2013.

In this regard, we also request the ICC to postpone the trial of President Uhuru Kenyatta and suspend the proceedings against Deputy President William Samoei Ruto until such time as the UN Security Council considers the request for deferral.

While renewing the expression of our sincere gratitude, please accept, Mr. President, the assurances of our highest consideration.

1. **Republic of Kenya**



2. People's Democratic Republic of Algeria

3. Republic of Angola

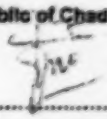
4. Republic of Benin

5. Republic of Botswana

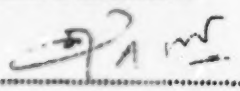
6. Burkina Faso

7. Republic of Burundi

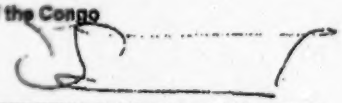
8. Republic of Chad



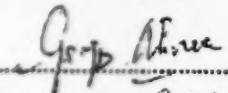
9. Union of the Comoros



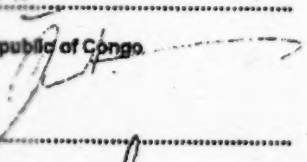
10. Republic of the Congo



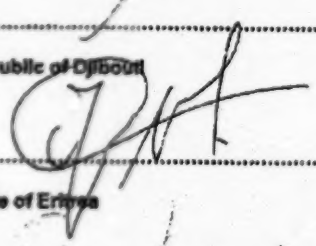
11. Republic of Côte d'Ivoire



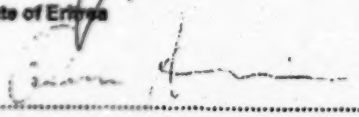
12. Democratic Republic of Congo



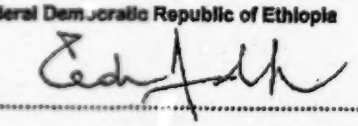
13. Republic of Djibouti



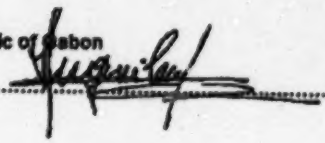
14. State of Eritrea



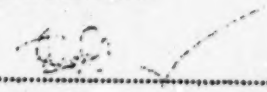
15. Federal Democratic Republic of Ethiopia



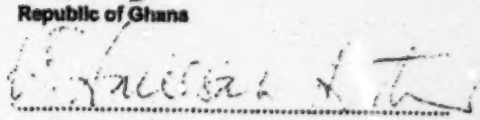
16. Republic of Gabon



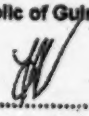
17. Republic of The Gambia



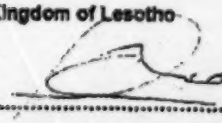
18. Republic of Ghana



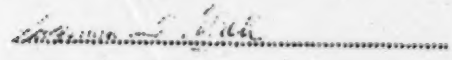
19. Republic of Guinea



20. Kingdom of Lesotho



21. Republic of Liberia



22. Libya

23. Republic of Malawi

24. Republic of Mali

25. Islamic Republic of Mauritania

26. Republic of Mauritius

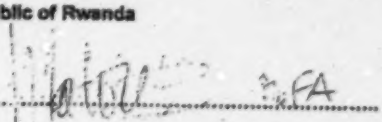
27. Republic of Mozambique

28. Republic of Namibia

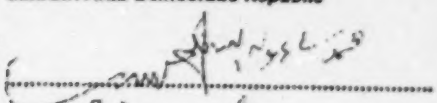
29. Republic of Niger

30. Federal Republic of Nigeria

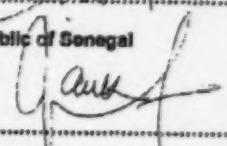
31. Republic of Rwanda



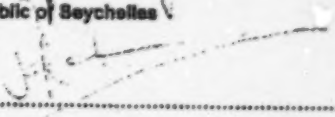
32. Sahrawi Arab Democratic Republic



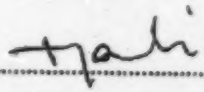
33. Republic of Senegal



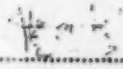
34. Republic of Seychelles



35. Republic of Sierra Leone

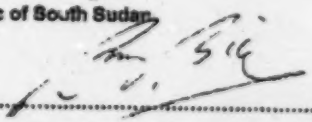


36. Republic of Somalia

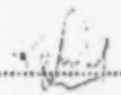


37. Republic of South Africa

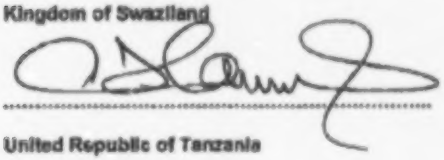
38. Republic of South Sudan



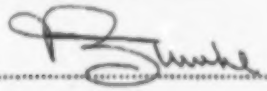
39. Republic of Sudan



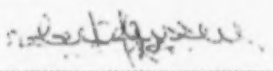
40. Kingdom of Swaziland



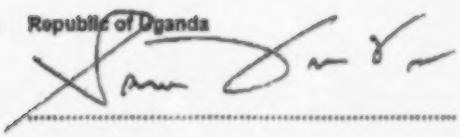
41. United Republic of Tanzania



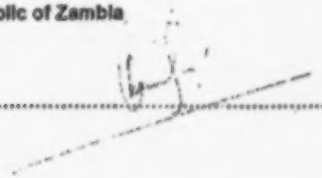
42. Republic of Togo



43. Republic of Uganda



44. Republic of Zambia



Republic of Zimbabwe

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cc.: Mr. Ban Ki Moon
Secretary General of the United Nations
New York, USA

Enclosure 3

DECISION ON AFRICA'S RELATIONSHIP WITH THE INTERNATIONAL CRIMINAL COURT (ICC)

The Assembly,

1. **TAKES NOTE** of the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.482(XXI) on the International Jurisdiction, International Justice and the International Criminal Court (ICC) and the Presentation made by the Republic of Kenya as well as the recommendations of the Executive Council thereon;

2. **REITERATES**, in accordance with the Constitutive Act of the African Union (AU), the AU's unflinching commitment to fight impunity, promote human rights and democracy, and the rule of law and good governance in the continent;

3. **REAFFIRMS** its previous Decisions on the abuse of the principles of Universal Jurisdiction adopted in Sharm El Sheikh in July 2008 as well as the activities of the ICC in Africa, adopted in January and July 2009, January and July 2010, January and July 2011, January and July 2012, and May 2013 wherein it expressed its strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace;

4. **REITERATES** AU's concern on the politicization and misuse of indictments against African leaders by ICC as well as at the unprecedented indictment of and proceedings against the sitting President and Deputy President of Kenya in light of the recent developments in that country;

5. **UNDERSCORES** that this is the first time that a sitting Head of State and his deputy are being tried in an international court and **STRESSES** the gravity of the situation which could undermine the sovereignty, stability, and peace in that country and in other Member States as well as reconciliation and reconstruction and the normal functioning of constitutional institutions;

6. **RECOGNIZES** that Kenya is a frontline state in the fight against terrorism at regional, continental and international levels and, in this regard, **STRESSES** the threat that this mission poses to the nation in particular and the continent in general, and the proceedings in Kenya against the President and the Deputy President of the Republic should not unduly divert and prevent them from fulfilling their constitutional responsibilities, including national and regional security affairs;

7. **RECALLS** that following the 2007 Post Election Violence (PEV), the mediation process in Kenya was initiated by AU which led to the enactment of the National Accord and Reconciliation Act and the Agreement establishing the coalition government, and **EXPRESSES** concern that the ongoing process before the ICC may pose a threat to the full implementation of the National Accord of 2008 and prevent the process of addressing the challenges leading to the post-election violence;

8. **EXPRESSES** its deep appreciation for the full cooperation that the President and Deputy President of Kenya have demonstrated to the ICC process and **CALLS UPON** the ICC to show the same level of cooperation in the process;

9. **REAFFIRMS** the principles deriving from national laws and international customary law by which sitting Heads of State and other senior state officials are granted immunities during their tenure of office;

10. **NOW DECIDES:**

(i) That to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office;

(ii) That the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office;

(iii) To set up a Contact Group of the Executive Council to be led by the Chairperson of the Council, composed of five (5) Members (one (1) per region) to undertake consultations with the Members of the United Nations Security Council (UNSC), in particular, its five (5) Permanent Members with a view to engaging with the UNSC on all concerns of the AU on its relationship with the ICC, including the deferral of the Kenyan and the Sudan cases in order to obtain their feedback before the beginning of the trial on 12 November, 2013;

(iv) To fast track the process of expanding the mandate of the African Court on Human and Peoples' Rights (AfCHPR) to try International Crimes, such as genocide, crimes against humanity and war crimes;

(v) That the Commission expedites the process of expansion of AfCHPR to deal with International Crimes in accordance with the relevant decision of the Policy Organs and requests AU Member States to support this process;

(vi) That African States Parties propose relevant amendments to the Rome Statute, in accordance with Article 121 of the Statute;

(vii) To request African States Parties to the Rome Statute of the ICC, in particular the Members of the Bureau of the Assembly of States Parties to inscribe on the agenda of the forthcoming sessions of the ASP the issue of indictment of African sitting Heads of State and Government by the ICC and its consequences on peace, stability and reconciliation in African Union Member States;

(viii) That any AU Member State that wishes to refer a case to the ICC may inform and seek the advice of the African Union;

(ix) That Kenya should send a letter to the United Nations Security Council requesting for deferral, in conformity with Article 16 of the Rome Statute, of the proceedings against the President and Deputy President of Kenya that would be endorsed by all African States Parties;

(x) Pursuant to this Decision, to request the ICC to postpone the trial of President Uhuru Kenyatta, scheduled for 12 November 2013 and suspend the proceedings against Deputy President William Samoei Ruto until such time as the UN Security Council considers the request by Kenya, supported by the AU, for deferral;

(xi) That President Uhuru Kenyatta will not appear before the ICC until such time as the concerns raised by the AU and its Member States have been adequately addressed by the UN Security Council and the ICC;

(xii) To convene, an Extraordinary Session, towards the end of November 2013, to review the progress made in the implementation of this Decision of the AU Assembly (Ext/Assembly/AU/Dec.1(Oct.2013)).

11. **FINALLY REQUESTS** the Commission to report on the implementation of this Decision to the next Ordinary Session of the Assembly in January 2014.